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September 12, 2022

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The Honorable Miguel Cardona  
Secretary  
U.S. Department of Education  
400 Maryland Ave., SW  
Washington, DC 20202

Dear Secretary Cardona:

We respectfully submit these comments in response to a Notice of Proposed Rulemaking (NPRM) titled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” which was published in the *Federal Register* on July 12, 2022.<sup>1</sup> As Members of the U.S. House of Representatives Committee on Education and Labor, we write to express our strong objections to the proposed rule. This proposal advances a left-wing ideological agenda that would reverse decades of advancement for women, leaving women less safe and with fewer athletic, educational, and career opportunities. The proposal also rolls back current policies that ensure fair and impartial sexual harassment adjudication procedures that protect both complainants and respondents.

### Redefinition of “Sex”

The NPRM redefines the term “sex” to include sexual orientation and gender identity. To be clear, this proposed change has nothing to do with protecting students from sexual harassment or discrimination. The preamble to the current regulations, implemented in 2020 by the Trump administration, made the federal government’s stance clear. That preamble said, “The [Department of Education] will not tolerate sexual harassment as defined in § 106.30 against any student, including LGBTQ students.”<sup>2</sup> In other words, LGBTQ students are already protected from harassment under Title IX in the same way all other students are protected.

<sup>1</sup> <https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

<sup>2</sup> “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.” *Federal Register*, Vol. 85, No. 97, Published Tuesday, May 19, 2020, Page 30179.

This NPRM goes much further by advancing a radical gender ideology that threatens the federal aid of nearly every school in America, from kindergarten to college, if those communities refuse to accept the Left's anti-science understanding of sex and gender. This NPRM represents another front in Democrats' ongoing culture war, a war whose casualties already include too many boys and girls whose developments have been interrupted and permanently harmed by this effort to redefine sex and gender. The Left's blatant and intentional attempts to redefine our sons' and daughters' identities by questioning biology itself has already done significant harm to our children and society, and it will do even more if this NPRM is finalized.

The NPRM will have an especially negative impact on the privacy, safety, and well-being of women and girls. This proposal deprives young girls of the protections Title IX is intended to provide by requiring schools to grant biological men self-identifying as women access to bathrooms, locker rooms, and other private spaces. This is unconscionable.

It is also wrong legally. The NPRM justifies this policy change by citing *Bostock v. Clayton County* (*Bostock*). However, the NPRM ignores the Supreme Court's own explicit warning against interpreting its *Bostock* opinion as applying to Title IX or other civil rights laws prohibiting sex discrimination. In that case, the Court stated, "But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind."<sup>3</sup>

### Undermining Athletic Opportunities

The redefinition of sex and gender undertaken in this NPRM will undermine athletic opportunities for women. This is tragic. Since Title IX was enacted, female participation in sports has increased by 1,057 percent at the high school level and 614 percent at the postsecondary level.<sup>4</sup> Title IX has worked.

Concern about competitive fairness for women is not a partisan issue. In June, the International Swimming Federation (FINA) approved a new policy to restrict most transgender athletes from competing in sanctioned events, with 71.5 percent of the international body's member federations approving of the policy.<sup>5</sup> The FINA president stated, "We have to protect the rights of our athletes to compete, but we also have to protect competitive fairness at our events, especially the women's category at FINA competitions."<sup>6</sup>

And yet, this administration is determined to ignore this international consensus and roll back women's progress. The Department of Education (Department) claims the NPRM will not impact athletics, stating that a separate rulemaking on the application of its Title IX interpretation to athletics will come at an unspecified future date.<sup>7</sup> This is a smokescreen

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<sup>3</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)

<sup>4</sup> <https://www.billiejeanking.com/equality/title-ix/#:~:text=The%20law%20opened%20doors%20and,1057%20percent%20and%20by%20614>

<sup>5</sup> <https://www.cnn.com/2022/06/19/us/fina-vote-transgender-athletes#:~:text=The%20new%20gender%20inclusion%20policy,on%20the%20puberty%20Tanner%20Scale.>

<sup>6</sup> Id

<sup>7</sup> 87 Fed. Reg. 41537, 41538 (July 12, 2022)

intended to mislead the public, presumably to avoid a backlash against such a brazen attempt to undermine the gains made by women over the last five decades.

Nothing in the NPRM states that recipients of federal funds should treat athletics differently than any other program or activity. More importantly, the Department has taken enforcement and litigation actions that make its intentions clear. First, under the current administration, the Department dismissed the prior administration's pending enforcement action related to Connecticut's failure to require segregated sports teams based on biological sex.<sup>8</sup> Second, the Department and the Department of Justice filed a Statement of Interest in *B.P.J. v. West Virginia State Board of Education* arguing that Title IX does not allow West Virginia to exclude biological males who identify as females from participating in female sports.<sup>9</sup>

We urge the Department to reverse its interpretation of Title IX as expressed in the NPRM in full. However, if the Department insists on finalizing these policies that will undermine women's athletic opportunities, the Department has an obligation to be transparent in its intentions and to subject its policies to proper notice and comment. The Department's subterfuge on this issue is not harmless. Thirteen states have laws protecting female athletes' access to fair and equal athletic opportunities.<sup>10</sup> Scholarships and the educational and career opportunities that come with them are at stake. Mr. Secretary, while your true intentions are clear, your public misrepresentations of your policies create ambiguity that you have an obligation to clarify.

### Parents' Rights

The NPRM also undermines the health and safety of our children by eliminating parents' rights. The NPRM would require schools to accept a child's professed gender identity regardless of biological sex without requiring any notification of the child's parents. We have already seen the harm caused when schools actively withhold from parents critical information about children's health and well-being. In one case, a 12-year-old girl attempted suicide after the child's school administration met secretly with the student over her gender identity.<sup>11</sup> This NPRM would mandate such practices in nearly every school in America. This proposal demonstrates a callous disregard for the rights of parents and a potentially tragic misunderstanding of kids' needs.

### Abortion Mandate

The NPRM adds "pregnancy or related conditions" to the list of categories covered under Title IX's prohibition against sex discrimination.<sup>12</sup> We believe Title IX already prevents sex-based discrimination against women who are pregnant, but we support making such policy explicit. No woman should face discrimination in her education program because she is expecting a child. However, the NPRM also directs schools to provide reasonable modifications "on an individualized and voluntary basis depending on the student's needs when necessary to prevent

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<sup>8</sup> OCR Case No. 01-19-4025, *Conn. Interscholastic Athletic Conf. et al.* (Aug. 31, 2020)

<sup>9</sup> *B.P.J. v. West Virginia State Board of Education*, Statement of Interest, 454-475 (S.D. W.V. 2021), <https://www.justice.gov/crt/case-document/file/1405541/download>

<sup>10</sup> <https://www.forbes.com/sites/madelinehalpert/2022/03/30/oklahoma-becomes-13th-state-to-limit-sports-access-for-transgender-students/?sh=546ed29255d1>

<sup>11</sup> <https://katv.com/news/nation-world/parents-say-school-secretly-met-with-daughter-over-being-trans-before-her-suicide-attempt-clay-county-florida-child-parental-right-campaign-vernadette-broyles-transgender-gay-lgbtq>

<sup>12</sup> 87 Fed. Reg. 41571, §106.10 (July 12, 2022)

discrimination and ensure equal access to the recipient's education program or activity."<sup>13</sup> The NPRM also states that such modifications "may include **but are not limited to...**" (emphasis added) and then provides a list of examples.<sup>14</sup> Nothing in this language would prevent the Department from imposing on schools a requirement to provide abortions for students, regardless of age or circumstances.

These are not hypothetical concerns. Sixty House Democrats recently wrote to the Department to ask for, among other things, "guidance for students and [institutions of higher education] clarifying that conditions related to pregnancy, including recovery time from the termination of a pregnancy, are also protected under Title IX."<sup>15</sup> Given this administration and other Democrats' public support for abortion under any circumstance, paid for with taxpayer funds, and at any point up to and even beyond birth, it is essential that any final regulation state explicitly that Title IX does not require schools to provide abortions or any abortion-related services.

### Definition of Sexual Harassment

The NPRM contains a new definition of "sex-based harassment" that significantly expands the current definition. The current regulations were based on the Supreme Court's ruling in *Davis v. Monroe County Board of Education (Davis)*<sup>16</sup> and prohibit "unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."<sup>17</sup> The NPRM defines harassment as "unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity."<sup>18</sup> The Department argues in the NPRM that the *Davis* standard is merely a liability standard applicable only to private actions seeking monetary damages.<sup>19</sup> However, this is not supported by the Court's opinion in the case. The Court stated, "Having previously held that such harassment is 'discrimination' in the school context under Title IX, this Court is constrained to conclude that student-on-student sexual harassment, **if sufficiently severe**, can **likewise** rise to the level of 'discrimination' actionable under the statute (emphases added)."<sup>20</sup> A fair reading of this language makes it clear the Court made no distinction between the definition of harassment for purposes of Department enforcement and a private action. The Department's departure from precedent produces a new definition that is open-ended, creating unnecessary ambiguity for schools and an unclear standard for students. The Department must return to established precedent by maintaining the current definition of "sexual harassment."

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<sup>13</sup> 87 Fed. Reg. 41572, §106.40(b)(4)(i) (July 12, 2022)

<sup>14</sup> 87 Fed. Reg. 41572, §106.40(b)(4)(iii) (July 12, 2022)

<sup>15</sup>

<https://bonamici.house.gov/sites/bonamici.house.gov/files/documents/FINAL%20Title%20IX%20Letter%20to%20Secretary%20Cardona.pdf>

<sup>16</sup> *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)

<sup>17</sup> 34 CFR §106.30(a)

<sup>18</sup> 87 Fed. Reg. 41569, §106.2 (July 12, 2022)

<sup>19</sup> 87 Fed. Reg. 41406 (July 12, 2022)

<sup>20</sup> *Davis v. Monroe County Board of Education*, 526 U.S. 630-631 (1999)

The Department's proposed standard as defined in the NPRM, when coupled with the previously discussed expansion of Title IX's scope, also has important free speech considerations. Under this proposed definition of sex-based harassment, would a student or professor who, during an academic discussion of sex or gender, politely expresses a sincerely held belief that another individual considers offensive subject an institution to a Title IX violation? The NPRM is unclear. With free speech under attack at so many schools, colleges, and universities, the Department has an obligation to avoid quashing debate on contested issues of public importance.

### Scope of Application

Current regulations clarify that institutions are responsible for responding to allegations of sexual harassment when the school exercises "substantial control over both the respondent and the context in which the sexual harassment occurs."<sup>21</sup> Current regulations further clarify that this includes sexual harassment that occurs in "any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."<sup>22</sup> In other words, for a recipient to be held liable under Title IX, the sexual harassment must occur in a situation that is connected to the recipient's education program or activity. As with the definition of sexual harassment described above, this standard was affirmed in *Davis*. The Court stated that "behavior must be serious enough to have the systemic effect of denying the victim equal access **to an education program or activity** (emphasis added)."<sup>23</sup> The NPRM ignores this standard and expands recipients' responsibilities to include sex-based harassment that contributes to a hostile environment even if the alleged harassment occurs outside the recipient's education program or activity.<sup>24</sup> While we support institutions having responsibilities to ameliorate circumstances that might impede a student's access to the recipient's education program or activity, the NPRM goes further by placing on institutions the responsibility to investigate and adjudicate underlying alleged misconduct that occurs completely separate from the institution's control. This will be an impossible standard for institutions to meet.

### Due Process Rights

The NPRM rolls back significant due process protections included in the current regulations. First, the regulations undermine the requirement for cross-examination. The current regulations require schools to provide each party the opportunity to cross-examine the other party. For colleges and universities, a final determination must be made at a live hearing during which cross-examination must be allowed.<sup>25</sup> The current regulations are based in part on case law. In *Doe v. Baum*, the 6th Circuit Court of Appeals found that universities must hold a hearing before imposing a sanction as serious as expulsion or suspension and that, when the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination.<sup>26</sup> A chance for the accused to challenge evidence presented against him or her is a fundamental part of this country's legal tradition. While

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<sup>21</sup> 34 CFR §106.44(a)

<sup>22</sup> Id.

<sup>23</sup> *Davis v. Monroe County Board of Education*, 526 U.S. 631 (1999)

<sup>24</sup> 87 Fed. Reg. 41571, §106.11 (July 12, 2022)

<sup>25</sup> 34 CFR §106.45(b)(6)(i)

<sup>26</sup> <https://www.thefire.org/doe-v-baum-903-f-3d-575-6th-cir-2018/>

university Title IX adjudications are not legal proceedings, they still carry significant penalties that can impact the rest of a student's life. The NPRM pretends to allow for cross-examination, but in most cases that cross-examination will not occur in a live hearing and will be subject to the whims of university investigators. Section 106.46(f)(i) permits institutions to limit any form of hearing or cross-examination to individual meetings with the parties.<sup>27</sup>

Second, the NPRM allows for single investigator models. Current regulations prohibit this approach, stating that, “The decision-maker(s), **who cannot be the same person(s) as the Title IX Coordinator or the investigator(s)**, must issue a written determination regarding responsibility (emphasis added).”<sup>28</sup> The NPRM removes this language and contains no other language requiring the decisionmaker(s) and investigator(s) to be different. Single investigator models are a threat to the civil liberties of all students.<sup>29</sup> As one federal judge held, “The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions.”<sup>30</sup>

Third, the NPRM removes the requirement that all parties have access to all the relevant evidence collected during an investigation. The current regulations require schools and institutions to “provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.”<sup>31</sup> The NPRM, however, requires investigators to provide the parties with only a “description of the evidence that is relevant to the allegations of sex discrimination” in the context of a sex discrimination allegation.<sup>32</sup> Even in the context of sex-based harassment at the postsecondary level, the NPRM states that parties are only entitled to receive a “written investigative report that accurately summarizes [the] evidence.”<sup>33</sup> While the NPRM does require institutions to provide all relevant evidence to the parties upon the request of a party, there is no requirement that the institution notify the parties of their right to request such evidence.

Mr. Secretary, this NPRM advances a radical, anti-science agenda that will undermine the safety and well-being of children, especially young girls. The NPRM will result in lost educational, career, and athletic opportunities for women. It also undermines court precedent and the due process rights of students. It will subject colleges and universities to further litigation similar to what resulted from the Obama administration's guidance in 2011 and 2014.

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<sup>27</sup> 87 Fed. Reg. 41578, §106.46(f)(i)

<sup>28</sup> 34 CFR §106.45(b)(7)(i)

<sup>29</sup> <http://udreview.com/editorial-single-investigator-model-for-sexual-misconduct-threatens-civil-liberties-for-all-students/>

<sup>30</sup> <https://www.thefire.org/proposed-title-ix-regulations-a-single-investigator-is-not-enough/>

<sup>31</sup> 34 CFR §106.45(b)(5)(vi)

<sup>32</sup> 87 Fed. Reg. 41576, §106.45(f)(4)

<sup>33</sup> 87 Fed. Reg. 41577, §106.46(e)(6)(i)



In contrast, the current regulations adhere to the statutory text of Title IX and strike an appropriate balance between protecting the safety of sexual assault victims while providing necessary due process protections to the accused. Because of this, we urge you to withdraw this NPRM and commit to implementing the current regulations faithfully.

Sincerely,



Virginia Foxx  
Ranking Member  
U.S. House Committee on Education and Labor



Joe Wilson  
Member of Congress



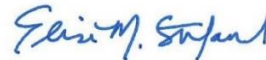
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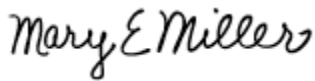
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